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In the Supreme Court of the United States

OCTOBER TERM, 1986

RAUL VIDAL, PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER the prohibition against police-initiated interrogation established by *Edwards v. Arizona* is triggered by a request for counsel made while in the custody of a German police officer who was conducting an investigation of the petitioner with the active cooperation of American military authorities pursuant to a treaty?

2. WHETHER military law enforcement agents must comply with the *Edwards* rule where treaty provisions mandate cooperation between American and German authorities in the investigation of criminal offenses committed by American soldiers and where the petitioner was advised by the German police of the right to a military lawyer?

3. WHETHER in light of the cooperation mandated by treaty and statistics demonstrating that 99.9 percent of the cases investigated by the German polizei are prosecuted by the military authorities, knowledge of an accused soldier's request for counsel made to a German officer should be imputed to American agents who subsequently conduct interrogation?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
Appendix A	1a
Appendix B	13a

TABLE OF AUTHORITIES

Cases:

Connecticut v. Barrett, ___ *U.S.* ___, 107 S.Ct. 828 (1987)	5
Edwards v. Arizona, 451 U.S. 477 (1981)	*passim*
Elkins v. United States, 364 U.S. 206 (1960)	10
Karr v. Wolff, 556 F. Supp. 760 (N.D. Ill. 1983)	6, 9
Michigan v. Mosley, 423 U.S. 96 (1975)	10
Miranda v. Arizona, 384 U.S. 436 (1966)	5, 9-11
Reid v. Covert, 354 U.S. 1 (1957)	11
Smith v. Illinois, 469 U.S. 91 (1984) (*per curiam*)	5
United States v. Covington, 783 F.2d 1052 (9th Cir. 1985), *cert. denied*, 107 S.Ct. 117 (1986)	9
United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975)	8
United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971)	8-9
United States v. Scalf, 708 F.2d 1540 (10th Cir. 1983)	5-6, 9
United States v. Welch, 455 F.2d 211 (2d Cir. 1972)	8
United States v. Vidal, 23 M.J. 319 (C.M.A. 1987)	7-8, 10
Westover v. United States, 384 U.S. 436 (1966)	10

Constitution and Statutes:

U.S. Const. amend. V	1, 4-5, 8, 10-11
28 U.S.C. § 1259(3) (Supp. II 1984)	1

Page

Treaties:

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.3 6-9

North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241 (1949), T.I.A.S. No. 1964 4

Status of Forces in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351 6-9

Other Authorities:

Dep't of Air Force Pam. 110-20, *Selected International Agreements,* Article 19 From The Agreement To Supplement The Agreement Between The Parties To The North Atlantic Treaty Regarding The Status Of Their Forces With Respect To Foreign Forces Stationed In The Federal Republic of Germany With Agreed Minutes (German Formula), p. 2-17 (27 July 1981) 7

Office of the Clerk of Court, United States Army Court of Military Review (March 1987) .. 11

Office of the Director of Information, Operations and Reports, Dep't of Defense (March 1987) ... 11

Office of the Judge Advocate General, Dep't of the Army, Dep't of Defense, *Report of Statistics On The Exercise Of Criminal Jurisdiction By Foreign Tribunals Over United States Personnel, December 1984-30 November 1985* 7

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No.

RAUL VIDAL, PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Raul Vidal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 23 M.J. 319 (C.M.A. 1987) (Appendix A). The opinion of the Army Court of Military Review appears at 17 M.J. 1114 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 23, 1987, affirming petitioner's convictions dated December 15, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides:

Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

On the evening of August 30, 1982 at Germersheim, Federal Republic of Germany, a German girl was abducted and raped by two men. Investigation by the German police led to the identification of the petitioner and another soldier as suspects. Both suspects were apprehended at their barracks by several German police officers around midnight with the assistance of the military police (R. 46, 52, 72, 81). Upon learning of the seriousness of the accusations, one of the military policemen, Specialist Four Buggy, advised the petitioner of his rights to remain silent and to obtain a lawyer (R. 46-47, 81).

Subsequently, the German police took both soldiers to the German police station at Germersheim (R. 48). Specialist Four Buggy and another military policeman followed in a separate vehicle (*id.*). At the police station, the German officers decided to administer a blood-alcohol test to the petitioner (R. 48, 82). He was then taken to a German hospital by one of the officers, Helmut Seiter, unaccompanied by the military policemen (*id.*).

Prior to administering the blood-alcohol test, Herr Seiter informed the petitioner of his rights by handing him a form to read (R. 86; Defense Exhibit A). This bilingual form, with the top portion in English, indicated that the petitioner was suspected of the offense of kidnapping (R. 54; Defense Exhibit A). The document advised the petitioner of his rights to remain silent and to consult with counsel, including the right to military counsel should he be subject to the Uniform Code of Military Justice.[1] The petitioner marked on the

[1] The rights advisement included the following:

> - I understand that I have the right to remain silent and that any statement I make may be used as evidence against me in a criminal trial.
>
> I understand that I have the right to consult with counsel and to have counsel present with me during questioning. I may retain counsel at my own expense or counsel will be appointed for me at no expense to me. *If I am subject to the Uniform Code of Military Justice, appointed counsel may be military counsel of my own choice if he is reasonably available.*
>
> I understand that even if I consent to being questioned now without having counsel present, I may stop answering questions at any time. Also, I may request counsel at any time during questioning.

(Defense Exhibit A) (emphasis added).

document that he wanted counsel and that he did not consent to questioning (*id; see also* R. 82). Herr Seiter did not interrogate the petitioner (R. 58).

After completion of the blood-alcohol test, the petitioner was returned to the German police station and placed in a cold cell (R. 85). At approximately 4:30 a.m. Special Agent Zwemke of the United States Army Criminal Investigation Command (CID) arrived at the police station to investigate the kidnapping and rape incident (R. 50, 62). He was briefed by both Specialist Four Buggy and Herr Seiter on the progress of the investigation (R. 48, 59-60, 62). According to Herr Seiter, the briefing he gave Special Agent Zwemke was "normal. . . . just some general information that has to be conducted so that they know where to start from." (R. 59). Herr Seiter did not tell Special Agent Zwemke of the petitioner's request for an attorney, but he was "almost certain" Special Agent Zwemke saw the form reflecting the petitioner's request because it was left on the table along with other related documents (R. 60-61). However, Special Agent Zwemke never looked at the document nor was he otherwise informed of the petitioner's invocation of his rights (R. 63-64).

When awakened by Special Agent Zwemke at approximately 5:00 a.m. the petitioner initially thought Special Agent Zwemke might be his attorney, but upon learning that he was a CID agent the petitioner "had doubts about talking to him at all" (R. 62, 83). Special Agent Zwemke advised the petitioner of his rights to remain silent and to counsel (R. 65; Prosecution Exhibit 5). He also stated to the petitioner that "it would be better for [you] to make a statement" and that if he did not "the polizei would handle [the case] by themselves. . . ." (R. 71, 83). Petitioner interpreted this statement to mean that the German police would beat him if he did not cooperate with the agent (R. 83-84). Even though he "wanted counsel all along" the petitioner decided to give a statement to Special Agent Zwemke because he was "very scared" (R. 84-85).

The statement he made contained admissions to the abduction and rape of the German girl (Prosecution Exhibit 6). A motion to suppress this statement was denied at trial (R. 90-91). The petitioner was subsequently convicted by a court-martial of both kidnapping and rape.

The constitutional questions involved were fully litigated at trial and at every stage of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to the Court's jurisdiction, was as follows:

> WHETHER THE PROPHYLACTIC RULE OF EDWARDS V. ARIZONA IS TRIGGERED BY A REQUEST FOR COUNSEL DIRECTED TO GERMAN POLICE WHO ARE INVESTIGATING A CRIME WITH THE ACTIVE COOPERATION OF AMERICAN MILITARY POLICE.

REASONS FOR GRANTING THE WRIT

In rejecting petitioner's argument, the Court of Military Appeals based its decision on the fact that the request for counsel was directed at the German police rather than at American military authorities. The lower court disregarded the substantial investigative cooperation between the German police and the American military authorities mandated by treaty, which must be recognized in order to promote the purpose of the *Edwards* rule. This petition presents an issue of first impression, concerning members of the Armed Forces stationed within the territories of our allies under the North Atlantic Treaty.[2]

I. APPLICATION OF THE RULE ESTABLISHED IN *EDWARDS V. ARIZONA* TO BAR INTERROGATION BY AMERICAN AUTHORITIES AFTER THE SUSPECT SOLDIER MAKES A REQUEST FOR COUNSEL TO GERMAN LAW ENFORCEMENT AGENTS IS NECESSARY TO FULLY PROTECT AN ACCUSED SOLDIER'S FIFTH AMENDMENT RIGHTS.

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[2] Apr. 4, 1949, 63 Stat. 2241 (1949), T.I.A.S. No. 1964 (effective Aug. 24, 1949).

"The fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.' " *Connecticut v. Barrett*, ___ U.S. ___, 107 S.Ct. 828, 831 (1987), *quoting Miranda v. Arizona*, 384 U.S. 436, 469 (1966). To this end, the rule established in *Edwards v. Arizona*, 451 U.S. 477 (1981), was designed to insulate the exercise of fifth amendment rights from government coercion by prohibiting further police interrogation after the invocation of these rights. *See Connecticut v. Barrett*, 107 S.Ct. at 832. The *Edwards* bright line rule provides that:

> an accused . . . having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Edwards, 451 U.S. at 484-85. "In the absence of such a bright-line prohibition, the police, through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*).

In the instant case, there is no question that the petitioner made an unequivocal written request for counsel. Further, it is undisputed that the petitioner's incriminating statement was made in response to police-initiated interrogation by a military law enforcement agent. The issue before the Court is a narrow one, *i.e.*, whether the petitioner's request for counsel, which was directed to a German police officer, triggered the *Edwards* rule to prohibit further interrogation by American authorities in light of the treaty between the United States and the Federal Republic of Germany.

Clearly *Edwards* applies to those situations involving law enforcement agents who are bound by the United States Constitution regardless of the jurisdiction under whose authority they act. *See, e.g., United States v. Scalf*, 708 F.2d 1540 (10th

Cir. 1983) (accused's request for counsel made to a state patrolman barred subsequent interrogation by FBI agents who were unaware of the request); *Karr v. Wolff*, 556 F.Supp. 760 (N.D. Ill. 1983) (request for counsel to officers of one county barred questioning of accused by officers from a second county). Thus, once a suspect has invoked his right to counsel, knowledge of the request is imputed to all law enforcement officers who subsequently deal with the suspect. *Scalf*, 708 F.2d at 1544. This imposes a duty upon all officers initiating interrogation to determine whether the accused has made a prior request for counsel to officers who previously dealt with him. It is a logical extension of *Edwards* to apply the rule to the petitioner's case.

The cooperative relationship between the German and American authorities in this case was required by treaty.[3] Authorities of both nations must share evidence and must cooperate in criminal investigations that involve American soldiers.[4] Certain provisions facilitate the mutual assistance

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[3] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.3 (effective Aug. 23, 1953), hereinafter cited "NATO SOFA." This agreement extends to the Federal Republic of Germany by virtue of a subsequent agreement, *i.e.*, Status of Forces in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351 (effective July 1, 1963), hereinafter cited "Supplementary Agreement." The NATO SOFA embodies reciprocal criminal-jurisdiction provisions that are designed to avoid jurisdictional clashes when military personnel of the "sending state" are assigned to peacetime duty within the borders of the "receiving state." Jurisdiction may be either exclusive or concurrent, and is concurrent when the misconduct charged amounts to a crime under the law of each state. NATO SOFA, article VII. Where the right to exercise jurisdiction is concurrent, the receiving state has the primary right to exercise jurisdiction over all offenses except those that: (1) are "solely against the property or security of [the sending] State, or . . . against the person or property of another member of the force or civilian component of [the sending] State or of a dependent"; or (2) "[arise] out of any act or omission done in the performance of official duty." NATO SOFA, article VII, para. 1(a). These provisions are accompanied by other provisions relating to waiver of jurisdiction. NATO SOFA, article VII, para. 3(a).

[4] NATO SOFA, article VII, para. 6(a) provides that:

> The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offenses,

between the two countries. For instance, American officials are given the right to attend interrogations of American soldiers conducted by the German authorities.[5] Also, the United States has an absolute right to maintain custody of its soldiers during pretrial proceedings where the Germans have retained jurisdiction for prosecution.[6] Rape offenses are identified as requiring "particularly close" cooperation.[7]

The Court of Military Appeals concluded that despite the obligations of mutual assistance under the NATO SOFA "the investigators in the host country cannot be considered as simply an extension of American investigative activity and that admissibility of the evidence seized by them is not to be tested by American constitutional standards." 23 M.J. at 323. The lower court's conclusion does not comport with the reality of the extensive cooperative relationship between the American and German authorities. During a one-year period, there were 6445 non-traffic offenses committed by American personnel where the Germans had the primary right to jurisdiction.[8] Of those cases, the Germans waived jurisdiction 99.9 percent of the time.[9] These statistics clearly indicate that, with very few exceptions, it is the military authorities who prosecute the cases investigated by the Germans. For all practical purposes, the German polizei act as surrogates of the American authorities.

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and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense."

[5] Supplementary Agreement, article 25(2).

[6] Supplementary Agreement, article 22(1)(b).

[7] *See* Dep't of Air Force Pam. 110-20, *Selected International Agreements*, Article 19 From the Agreement To Supplement The Agreement Between The Parties To The North Atlantic Treaty Regarding The Status Of Their Forces With Respect To Foreign Forces Stationed In The Federal Republic Of Germany With Agreed Minutes (German Formula), p. 2-17 (27 July 1981).

[8] Office of the Judge Advocate General, Dep't of the Army, Dep't of Defense, *Report of Statistics On The Exercise of Criminal Jurisdiction By Foreign Tribunals Over United States Personnel 1 December 1984-30 November 1985.*

[9] *Id.*

The facts of the instant case evidence the cooperative efforts between the American military authorities and the Germans pursuant to treaty provisions. The military police assisted the Germans in the apprehension of the petitioner. They remained with the petitioner at the German police station until the arrival of the CID agent.[10] The German police officer briefed Special Agent Zwemke on the investigation's progress and even provided him with pertinent documents, including the very form in which the petitioner made his counsel request. Despite the ready availability of the document, Special Agent Zwemke remained conveniently ignorant of petitioner's request.

The German police also advised the petitioner of his right to military counsel under the Uniform Code of Military Justice. The court below expressed puzzlement over this advisement, but deemed it immaterial to the issue. *Vidal*, 23 M.J. at 324. The significance of that advisement is that the accused soldier has no right to a military counsel if he is prosecuted by the Germans.[11] The fact that the Germans advised the petitioner of his rights under American law demonstrates the extensiveness of the cooperation involved.

Undoubtedly this cooperation facilitates prosecution of the accused soldier regardless of which sovereign ultimately prosecutes him. If the cooperation required by the NATO SOFA and Supplementary Agreement can be used to ensure successful prosecution of the accused, it should also be used to ensure protection of the accused's exercise of his fifth amendment rights. It is not petitioner's contention that the conduct of foreign officials must conform to the requirements of the Constitution.[12] It is only the conduct of American

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[10] Although the military police did not accompany the petitioner to the hospital where the blood-alcohol test was administered, it appears that they could have done so. *See* Supplementary Agreement, article 22(1)(b).

[11] If the German authorities prosecute the soldier, the United States has the right to have a representative attend the trial only as an observer. *See* Supplementary Agreement, article 25(1)(a).

[12] The federal cases cited by the lower court, *i.e.*, United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975); United States v. Welch, 455 F.2d 211 (2d Cir. 1972); United States v. Nagelberg,

military law enforcement agents that is under scrutiny here since petitioner's confession was elicited by an American agent, not the German police.[13]

Requiring American agents to comply with the *Edwards* rule in the instant situation would impose no additional burden beyond what is required of them when dealing with other American agents. The NATO SOFA provides a ready framework for easy compliance. In fact, the cooperation between the military and German authorities, by virtue of the Supplementary Agreement, may even exceed the degree of cooperation that exists between state and federal authorities because there often is no comparable agreement between American jurisdictions. Therefore, if agents of different American jurisdictions are not excused from compliance with *Edwards* based on ignorance of counsel requests,[14] then there is no sound practical or legal basis to grant such an exception to American agents in their dealings with German officials where cooperation is already a matter of treaty. To do so would invite intentional or negligent disregard of a soldier's request for counsel and encourage military investigators to

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434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971), all involved the failure of foreign officers to give *Miranda* warnings. The circuit courts held that this omission did not preclude the admission of defendants' confessions obtained by the foreign officers.

[13] In United States v. Covington, 783 F.2d 1052 (9th Cir. 1985), *cert. denied*, 107 S.Ct. 117 (1986), the Ninth Circuit Court of Appeals held *Edwards* to be inapplicable where the accused's confession was obtained by foreign officers after a request for counsel was made to such officers. Three facts distinguish *Covington* from the instant case. First, the petitioner's confession was given in response to interrogation by an American agent. Second, in *Covington* there was no agreement comparable to the NATO SOFA mandating cooperation between the American and foreign authorities. Finally, American military personnel do not voluntarily subject themselves to the authorities of foreign countries, as do tourists and businessmen. Soldiers must go wherever assigned. American soldiers should not be deprived of the constitutional protections that the Court has found applicable to citizens within the United States merely because, pursuant to orders, they are serving their country in foreign lands.

[14] *See* United States v. Scalf, 708 F.2d at 1544-45; Karr v. Wolff, 556 F.Supp. at 765.

feign ignorance of information already obtained by their German counterparts.[15] It would create a situation where military law enforcement agents can capitalize on the soldier's weakened will resulting from apprehension and confinement by the German authorities, thereby defeating the purpose of the *Edwards* decision to prevent police-coerced self-incrimination.

The inherent psychological pressure attendant upon arrest has been well-recognized by the Court. By their very nature, custodial interrogations "[compel] pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467.[16] The *Edwards* prohibition against further questioning once the suspect invokes his fifth amendment right to counsel prevents the police from "persisting in repeated efforts to wear down [the accused's] resistance and make him change his mind." *Michigan v. Mosley*, 423 U.S. 96, 105-106 (1975). The pressures and the resulting coercive effect are even greater when the accused soldier has been in the custody of German authorities before he is confronted by a fellow American soldier, an interrogator, as was the case here.[17] The *Edwards* rule must apply to fully protect the accused soldier's fifth amendment rights.

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[15] As the Court stated in Elkins v. United States, 364 U.S. 206, 217 (1960), "the exclusionary rule . . . is calculated . . . to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." Although *Elkins* concerned the fourth amendment exclusionary rule, the *Edwards* rule serves a similar aim in deterring police misconduct in the form of badgering an accused after he has invoked his right to counsel.

[16] *See also* Westover v. United States, 384 U.S. 436 (1966) (accused was questioned by local authorities for several hours and then turned over to federal officials, waiver of rights held invalid where rights advisement was given at end of interrogation).

[17] The lower court failed to recognize these pressures. It reasoned:

> a request for counsel made in connection with a foreign investigation may result only from the American suspect's unfamiliarity with the foreign legal system and does not necessarily mean that the suspect is unwilling to talk to an American investigator until he has been provided counsel.

23 M.J. at 323. While that may be true in some instances, the petitioner's testimony contradicts that assumption. He testified that he wanted counsel

II. THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO RESOLVE THE QUESTIONS PRESENTED SINCE THE INSTANT CASE PRESENTS A SIGNIFICANT AND RECURRING ISSUE IN THE MILITARY.

The petitioner's case highlights a common, recurring situation in the military. The Army has more than 200,000 soldiers, comprising one-fourth of its total strength, stationed in Germany.[18] Approximately one-third[19] of all Army courts-martial are held in Germany. Since the German authorities waive 99.9 percent of the cases where they have the primary right to jurisdiction,[20] German police are effectively acting on behalf of U.S. military authorities who prosecute the cases.

Our government is "entirely a creature of the Constitution," thus it is bound to respect the limitations which the Constitution imposes upon its powers, whether it acts at home or abroad. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957). In *Miranda* and *Edwards* the Court sought to combat the coercive pressures inherent in custodial interrogation and the debilitating effect upon the accused when his request for counsel has been dishonored. Application of *Edwards* to the circumstances of the instant petition is essential to afford the accused soldier full protection of his constitutional rights. To hold otherwise would penalize members of the Armed Forces

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"all along" and was reluctant to speak with the CID agent. He only did so because he feared brutal treatment by the German police based on rumors he had heard (R. 84, 86). From the petitioner's perspective, he chose the lesser of the two evils and agreed to speak with Agent Zwemke rather than be subjected to German interrogation.

[18] These statistics were obtained from the Office of the Director of Information, Operations and Reports, Dep't of Defense (March 1987).

[19] During the period from April 1985 through March 1986, there were 4439 courts-martial in the Army; 1416 were from the U.S. Army Europe and Seventh Army divisions. Office of the Clerk of Court, United States Army Court of Military Review (March 1987).

[20] *See* note 8, *supra*.

suspected of committing offenses only because of the circumstance of being stationed overseas in the service of their country. Such a dual standard should not exist. American service men and women are entitled to the same treatment and respect of their constitutional rights from American law enforcement agents whether at home or abroad.

CONCLUSON

For the foregoing reasons, including the importance of the constitutional issue involved, the petition for certiorari should be granted. The questions presented are substantial and are of crucial significance. The procedural safeguard at issue concerns the protection of fundamental constitutional rights of American soldiers.

Respectfully submitted,

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APPENDICIES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 49,957.
CM 443794.

UNITED STATES, APPELLEE,

v.

RAUL* VIDAL, PRIVATE FIRST CLASS, U.S. ARMY,
APPELLANT.

February 23, 1987

For Appellant: Captain Bernard P. Ingold (argued); Colonel William G. Eckhardt, Lieutenant Colonel Arthur L. Hunt, Captain Thomas J. Feeney (on brief); Colonel Brooks B. La Grua, Lieutenant Colonel William P. Heaston, Lieutenant Colonel Paul J. Luedtke, Major Eric T. Franzen and Captain Lorraine Lee.

For Appellee: Captain Stephen B. Pence (argued); Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Joseph A. Rehyansky, Captain Dean C. Berry (on brief); Captain John J. Park, Jr. and Captain Kurt J. Fischer.

OPINION OF THE COURT

EVERETT, Chief Judge:

A general court-martial composed of officer and enlisted members tried appellant at Kaiserslautern, Federal Republic of Germany, on charges of rape and kidnapping, in violation of Articles 120 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934, respectively. Contrary to his pleas, Vidal was convicted of both charges and was sentenced to a dishonorable discharge, 10 years' confinement, total forfeitures, and reduction to the grade of E-1.

*The opinion erroneously reflects petitioner's name as "Paul."

The convening authority approved these results; and the Court of Military Review affirmed the findings and sentence. 17 M.J. 1114 (1984). We granted review of these issues:

I

WHETHER THE PROPHYLACTIC RULE OF EDWARDS V. ARIZONA IS TRIGGERED BY A REQUEST FOR COUNSEL DIRECTED TO GERMAN POLICE WHO ARE INVESTIGATING A CRIME WITH THE ACTIVE COOPERATION OF AMERICAN MILITARY POLICE.

II

WHETHER THE APPELLANT WAS PREJUDICED BY THE FAILURE OF THE MILITARY JUDGE TO REQUIRE THE PROSECUTION OR THE MEMBERS TO ELECT WHETHER APPELLANT WAS A PERPETRATOR OR AN AIDER AND ABETTOR.

Factual Background

Fraulein Andrea Blum testified that she was a student at the University in Germersheim, Germany, and that on August 30, 1982, she had gone with her boyfriend, Roland Mueller, to a tavern in that city. After the couple had drunk beer for a while and had gone to a second tavern, they started to walk back to her apartment. A large American-made automobile stopped near them, and a black man exited from the passenger side. Suddenly, he grabbed Andrea and, despite her screams and struggling, dragged her into the car. She hit him and kicked the windshield so hard that it cracked. He then struck her in the face and pressed her face into the dashboard. Andrea begged her assailant and the driver to let her out; but they refused. They drove a few kilometers to a wooded area near Sonderheim, a neighboring town. She was pulled into the back seat, and the passenger proceeded to have intercourse with her. According to Andrea, she did nothing to encourage him; but she did not actively resist because of his having beaten her when she had tried earlier to free herself. "I was very afraid," she testified. " I just thought to myself just be calm and quiet so that I don't get killed."

After the passenger had inserted his penis into her vagina, she pretended to have an orgasm in the hope that this would shorten her ordeal. Subsequently, the driver climbed into the back seat and inserted his penis. She begged him several times not to kill her; and finally he withdrew. Thereafter, the two men drove elsewhere; and the passenger forced her out of the car, and she walked to a friend's home.

Meanwhile, Mueller had reported the incident to the German police in Germersheim. Also, Siegbert Kopp, a pedestrian, informed the police that shortly after 9:00 p.m. he had noticed a distinctive American car in which a woman had been struggling with a man and screaming in fear.

As a result of information they received from Mueller, Kopp, and later from Andrea, the German police commenced an investigation, which led quickly to appellant and to a fellow soldier, Tyrone Hunt. Early in the morning of August 31, they apprehended the two men at their barracks; and immediately American military police were summoned. Upon arriving at the barracks and learning of the serious accusations against the two soldiers, one of the military policemen, Specialist Four Thomas Buggy, advised Vidal verbally that he had the right to remain silent and to get a lawyer. However, Buggy was not an interrogator and did not attempt to elicit a waiver of rights or to initiate an interrogation. Vidal seemed to understand his rights but did not respond to Buggy's advice.

Subsequently, still early in the morning of August 31, the German police transferred Vidal and Hunt from their barracks to the German police station at Germersheim. The two military policemen followed in a separate automobile. After Vidal arrived at the police station, the German police authorities decided to administer a blood-alcohol test. Helmuet Seiter, a German police officer, took Vidal to a hospital for this purpose; but the military policemen did not accompany them.

Prior to administering the blood-alcohol test, Herr Seiter informed appellant of his rights under German law with respect to such tests. In giving this advice, Seiter used a document of which the top half is in English and begins with a recital that the person to be questioned has been informed

that the interrogator wishes to question him about a crime "of which" he is "accused or suspected." A blank had been filled to inform Vidal that kidnapping was the suspected offense. Then the recital continues:

> I understand that I have the right to remain silent and that any statement I make may be used as evidence against me in a criminal trial.
>
> I understand that I have the right to consult with counsel and to have counsel present with me during questioning. I may retain counsel at my own expense or counsel will be appointed for me at no expense to me. If I am subject to Uniform Code of Military Justice, appointed counsel may be military counsel of my own choice if he is reasonably available.
>
> I understand that even if I consent to being questioned now without having counsel present, I may stop answering questions at any time. Also, I may request counsel at any time during questioning.

The form next contains a place for the suspect to indicate whether he wants counsel and whether he consents to being questioned. Vidal had marked the document to indicate both that he wanted counsel and that he did not "consent to being questioned." The bottom half of the form, which was not filled in, contains a German translation of the same information about the suspect's rights which appears in English at the top of the form.

After the blood-alcohol test had been administered, Vidal was returned to the German police station, where, at about 4:30 a.m., Special Agent Jeffrey Zwemke of the Criminal Investigation Command (CID) arrived to investigate for the American military authorities. Specialist Four Buggy and Herr Seiter briefly informed Zwemke of the suspected crimes, but neither told him that Vidal had asserted his right to counsel to the German police. Indeed, Buggy was unaware of this fact. Special Agent Zwemke proceeded to advise Vidal of his right to remain silent and his right to counsel. Appellant waived these rights and made a statement. Therein, he admitted that he had driven the car with Hunt as his passenger; after a girl had gotten into the front seat of the

car and they drove off, she had started to fight; they had driven to a wooded area, where he parked; the girl had tried to run but Hunt had caught her; and Hunt and Vidal had intercourse with her.

Appellant moved unsuccessfully to suppress this statement. In overruling his motion, the military judge found that: (1) Vidal had made no "claim of rights to Specialist Four Buggy"; (2) "the German Police read the accused's rights concerning questions in connection with a blood alcohol test"; (3) Special Agent Zwemke was not informed in any way that Vidal "had been advised of his rights"; (4) Vidal "waived his rights" to Zwemke; and (5) his "statement was voluntary" and "not to result of . . . coercion, threats, unlawful promises, or inducements, or psychological coercion."

Appellant's testimony in his own defense at trial conformed generally to his pretrial statement to Special Agent Zwemke. His version was that Andrea Blum had voluntarily entered the car but had started to resist as soon as he drove away and that she had bitten and kicked Hunt and broken the windshield. Also, he had seen Hunt strike her in the face with his "right hand and his closed left fist." She had said, "Kill me or let me out"; but he kept on driving. They drove to a "wooded area" outside of town where Hunt moved Andrea into the back and had sexual intercourse with her. Apparently, she had an orgasm. Hunt had then invited Vidal to have intercourse with the girl; and he did so. However, he thought she had consented to the intercourse with him because (a) she appeared to enjoy intercourse with Hunt; (b) after having intercourse with her, Hunt had told him to "go ahead"; and (c) when Vidal climbed in the back seat with his trousers down, she had groaned in a manner which he construed as an indication of pleasurable anticipation.

After the evidence was all in, the military judge discussed his proposed instructions with counsel and mentioned that it appeared that the Government had proceeded on the premise that Vidal was a principal, rather than an aider and abettor. The trial counsel disagreed and pointed out that "Vidal was an aider and abettor" of a "rape committed by PFC Hunt." The defense objected to any instruction on an

aider-or-abettor theory on the ground that it had not been covered by the rape allegations and that the evidence had focused on whether Andrea Blum had given her consent to intercourse with Vidal. Despite the defense objection, the military judge ultimately instructed the court members in a manner that allowed them to convict Vidal of rape if either he had perpetrated it himself or had aided or abetted the commission of the offense by Hunt. The judge did not instruct the members to consider separately whether appellant was guilty of rape as a perpetrator or as an aider and abettor.

Issue I

Under the rule established in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), an investigator must terminate custodial interrogation if the suspect requests counsel. Unless the suspect himself "initiates" a further generalized discussion, the questioning cannot be resumed until counsel has been made available. *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). The interrogation cannot be resumed even if the request for counsel was made to an investigator other than the person who seeks to interrogate the suspect. Imputation of knowledge of the request for counsel has taken place even when the interrogator was a member of a police agency different from that of the person to whom the request was made.

Thus, after remand from the Supreme Court, *see Goodson v. United States*, 471 U.S. 1063, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985), we ruled that a statement to a military police investigator should have been excluded from evidence because, prior to the taking of the statement, the accused had made a request for counsel to the military policeman who had apprehended him.[1] Similarly, in *United States v. Reeves*, 20 M.J.

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[1] *United States v. Goodson*, 22 M.J. 22 (C.M.A.), *pet. for recon. denied*, 22 M.J. 247 (C.M.A.1986). *See also United States v. Goodson*, 14 M.J. 542 (A.C.M.R.1982); *United States v. Goodson*, 18 M.J. 243 (C.M.A.1984); and *United States v. Goodson*, 22 M.J. 947 (A.C.M.R.1986) (holding, on remand, that the accused's subsequent statement to his company commander was also inadmissible.)

234 (C.M.A.1985), we held that, because of an earlier request for counsel made to an investigator, the accused's statements to his company commander were inadmissible unless they had been initiated by the accused.[2] In other cases, as well, knowledge of a suspect's request for counsel has been imputed to other investigators and investigating agencies. *See, e.g., United States v. Harris*, 19 M.J. 331, 339 (C.M.A.1985); *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983).

Clearly, if Herr Seiter had been an American investigator – rather than a German police officer – the request for counsel made to him would have precluded the subsequent interrogation by Special Agent Zwemke and would have rendered inadmissible the statement which Zwemke obtained from appellant. However, the fact remains that Seiter was a German investigator and was conducting an investigation initiated by German authorities in response to acts which violated German law and of which a German national was the victim.

Generally, the actions and the knowledge of officials of a foreign nation are not imputed to American authorities in connection with the application of American constitutional guarantees. Thus, in *United States v. Morrison*, 12 M.J. 272 (C.M.A.1982), we refused to apply the exclusionary rule to a search by German police which had not been instigated or participated in by American officials. Also, we ruled there that the presence of American military personnel during the search did not of itself constitute participation. *See also* Mil.R.Evid. 311(c)(3), Manual for Courts-Martial, United States, 1969 (Revised edition). Although there are obligations of mutual assistance under the NATO Status of Forces Agreement, we have concluded that nonetheless the investigators in the host country cannot be considered as simply an extension of American investigative activity and that admissibility of the evidence seized by them is not to be tested by American constitutional standards. *Cf. United States v.*

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[2] *See also United States v. Reeves*, 21 M.J. 768 (A.C.M.R.1985), which on remand determined that the statements were inadmissible; and *United States v. Reeves*, 21 M.J. 391 (C.M.A. 1985) (summary disposition after A.C.M.R. decision on remand).

Ravine, 11 M.J. 325 (C.M.A.1981); *United States v. Jones*, 6 M.J. 226 (C.M.A.1979); *see also United States v. Mundt*, 508 F.2d 904 (10th Cir.1974), *cert. denied*, 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975); *United States v. Welch*, 455 F.2d 211 (2d Cir.1972); *United States v. Nagelberg*, 434 F.2d 585 (2d Cir.1970), *cert. denied*, 401 U.S. 939, 91 S.Ct. 935, 28 L.Ed.2d 219 (1971). Since the investigation by Herr Seiter should not be viewed as an investigation in behalf of American authorities, we see no reason to impute his knowledge of appellant's request for counsel to Special Agent Zwemke.

Even if Zwemke had been personally aware of the request for counsel made to German authorities, we do not believe that this knowledge would have precluded him from questioning Vidal. In this regard, we reason that a request for counsel made in connection with a foreign investigation may result only from the American suspect's unfamiliarity with the foreign legal system and does not necessarily mean that the suspect is unwilling to talk to an American investigator until he has been provided counsel. The suspect is adequately protected if he is warned of his rights under American law when first questioned by American officials. In short, we conclude that the requirements of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, are not triggered by a request for counsel made to a foreign official.

In the present case, we are somewhat puzzled by the German police officer's use of a form which refers to the Uniform Code of Military Justice and the appointment of military counsel. Indeed, we are unsure under what circumstances military counsel would be made available to advise an American servicemember who is being interrogated by foreign investigators. Moreover, if the foreign investigator was only seeking to perform a blood-alcohol test, there would be no right to counsel or any privilege against self-incrimination available under American law, since the extraction of a body fluid does not involve testimonial compulsion and so is not within the purview of the Fifth-Amendment guarantee against self-incrimination. *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908

(1966); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A.1983).[3] Despite our uncertainty as to the reason for the choice of the particular phraseology in the form, it was being used by German officials solely in connection with their investigation; and we do not believe that its use altered the nature of the investigation in a way that would cause *Edwards* to apply. Accordingly, we hold that the military judge acted properly in denying the motion to suppress.

Issue II

Appellant was charged with raping Andrea Blum; but the allegations do not indicate whether he was the perpetrator or only an aider and abettor to Hunt's actions. However, the standard-form specification of rape was sufficient to charge either theory; and even though the Government may initially proceed on one theory, it is entitled to utilize the alternative theory of guilt before the members. *See, e.g, United States v. Brooks*, 22 M.J. 441, 444 (C.M.A.1986). In a rape case, if several persons are holding the victim, it makes no difference whether a particular accused had intercourse with her; for he may be convicted as an aider and abettor. Likewise, in a homicide prosecution, if the victim was killed by a shot when several persons were shooting at him, it is immaterial whether the Government proves that the accused fired the fatal shot or was only part of the crowd which was shooting at the victim.

Under such circumstances it has not heretofore been required that two-thirds of the members agree as to the particular theory of liability. *Cf. United States v. Lomax*, 12 M.J. 1001, 1004-05 (A.C.M.R.), *pet. denied*, 13 M.J. 467 (1982); *United States v. Clements*, 12 M.J. 842, 845 (A.C.M.R.), *pet. denied*, 13 M.J. 232 (1982). And we do not believe now that such a requirement need be imposed in order to fulfill the statutory mandate that two-thirds of the court-martial members must concur in a finding of guilty. Art. 52(a)(2), UCMJ, 10 U.S.C. § 852(a)(2). *Cf. United States v. Barton*, 731

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[3] Probably, the warning is with respect to questions asked incident to the blood test (*e.g.*, what has the suspect drunk and when?).

F.2d 669 (10th Cir.1984). If one-third of the members are satisfied that the accused personally fired the shot and another third find that he aided someone else in doing so, he can properly be convicted of murder, because two-thirds of the court members are convinced beyond a reasonable doubt that the accused, on one theory or another, committed murder at the particular time and place. Likewise, if several persons are acting to overcome a woman's resistance to sexual intercourse, but only one of them actually has such intercourse, the Government can still convict an accused, even though it cannot prove beyond a reasonable doubt whether he personally had intercourse or only helped someone else have intercourse with the unwilling victim.

The present case, however, goes beyond the selection of a theory for holding an accused guilty for a single injury or result. Here, instead, there was evidence of two acts of penetration – the first by Hunt and the second by Vidal. As to the former, appellant was liable – if liable at all – only on a theory of aiding and abetting. As to the latter, he was criminally liable as a perpetrator, if liable at all.

The defense contends that, under these circumstances, the prosecution should be required to elect between the two alternatives for convicting of rape. Otherwise, the accused will be confused in defending himself; and the court members may themselves be confused. In this connection, appellate defense counsel points out that appellant had available a defense of mistake with respect to any government claim that he personally had raped Andrea Blum; but he did not assert this defense as to the aiding-and-abetting charge.

We recognize that usually where several similar but separate offenses are involved, the judge should require the prosecution to elect which offense is being prosecuted. Otherwise, an accused may have difficulty in preparing his defense; may be exposed to double jeopardy; and may be deprived of his right to jury concurrence concerning his commission of the crime. *See People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980); *Burlison v. State*, 501 S.W.2d 801 (Tenn.1973). However, an election has not been required where offenses are so closely connected in time as to constitute a single

transaction. *See, e.g., Commonwealth v. Farrell*, 322 Mass. 606, 78 N.E. 2d 697, 702 (1948) ("substantially continuous felonious assaults"); *Aumada v. State*, 657 S.W.2d 890, 892 (Tex.App.1983) ("several acts of rape . . . committed by one continuous act of force and threats"); *Watson v. State*, 184 Tenn. 177, 197 S.W. 2d 802, 806 (1946) ("continuous criminal action"); *People v. Mota*, 115 Cal.App.3d 227, 171 Cal.Rptr. 212 (1981) ("many continuous acts of forced sexual intercourse").

In this case, the interval between the two acts of sexual intercourse was very brief. The location was the same – namely, the parked car. The victim was the same. The penetration of the victim by Hunt and Vidal's subsequent intercourse with her were part of a continuous transaction.

If there had been evidence that appellant had personally engaged in the two acts of intercourse as part of a continuous transaction, the Government could not have been compelled to elect between them; nor would the defense have been entitled to an instruction that two-thirds of the court members must agree that a particular act of intercourse had occurred. In this case, any liability of appellant for the first act of intercourse was vicarious – as an aider and abettor. However, Article 77, 10 U.S.C.A. § 877 abolishes the distinction between principals and aiders-and-abettors; and, according to the language of that Article, if appellant aided Hunt, he was a "principal." *See United States v. Varraso*, 21 M.J. 129 (C.M.A.1985), *cert. denied*, 106 S.Ct. 1645, 90 L.Ed.2d 90 (1986). This being so, we see no significance in the circumstance that Hunt, rather than Vidal, first penetrated the victim. *Cf. Watson v. State and Aumada v. State*, both *supra*.

If two-thirds of the members of the court-martial were satisfied beyond a reasonable doubt that at the specified time and place, appellant raped Andrea Blum – whether he was the perpetrator or only an aider and abettor – the findings of guilty were proper. It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability

submitted to the members. That condition was amply satisfied in this case. Indeed, in light of the Government's evidence and Vidal's own admissions, the members probably were persuaded that he was criminally responsible for both acts of intercourse.

In a different context – that of multiplicity of charges – we have emphasized that a single transaction should not be divided into numerous separate components. We need not decide whether the two separate acts of intercourse could properly have been alleged as two separate rapes. However, certainly we shall not penalize the Government because it did not allege two separate rapes.

Decision

Appellant's pretrial statement to Special Agent Zwemke was properly admitted. The military judge properly declined to compel the Government to elect between theories of liability for the rape of Andrea Blum.

The decision of the United States Army Court of Military Review is affirmed.

Judge SULLIVAN did not participate.

COX, Judge (concurring):

I write merely to make it clear that my views concerning "imputing knowledge" of requests for counsel as expressed in *United States v. Harris*, 19 M.J. 331, 342 (C.M.A.1985), remain unchanged.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 443794

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS, RAUL VIDAL, SSN 133-56-8779, UNITED STATES ARMY, APPELLANT.

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30 April 1984.

Captain Bernard P. Ingold, JAGC, argued the cause for the appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Major Robert M. Ott, JAGC, and Captain Thomas J. Feeney, JAGC.

Captain Kurt J. Fischer, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, and Major Joseph A. Rehyansky, JAGC.

Before MOUNTS, YAWN and WERNER, Appellate Military Judges

OPINION OF THE COURT

MOUNTS, Senior Judge:

On 13, 14 and 15 December 1982, the appellant was tried by a general court-martial comprised of officer members at Kaiserslautern, Federal Republic of Germany. He was convicted of rape and kidnapping, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. 920 and 934, respectively. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement at hard labor for ten years, forfeiture of all pay and allowances and reduction to the grade of Private E-1.

On the night of 30 August 1982 the appellant and an accomplice abducted and raped a young German student in Sonderheim, Germany. The victim made a complaint of the crimes to the German police in nearby Germersheim, and an investigation ensued. The German police located and apprehended the appellant and his accomplice at their barracks.

After the appellant was placed in custody, Specialist Four Thomas Buggy and another military policeman were summoned to the scene. Upon learning that the appellant had been accused of two serious crimes, Specialist Buggy briefly advised the appellant of his rights to remain silent and counsel under American law. Article 31(b), Uniform Code of Military Justice, 10 U.S.C. 831(b); *United States v. Miranda*, 384 U.S. 436 (1966); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). Specialist Buggy did not attempt to elicit a waiver of those rights or initiate an interrogation. The appellant claimed he asked to see a lawyer, but Specialist Buggy testified that the appellant made no such request to him.

Subsequently, in the early morning of 31 August, the German police, pursuant to their investigation, transferred the appellant from his barracks to the German police station at Germersheim. The two military policemen followed in a separate automobile. After the appellant arrived at the German police station, German authorities decided to administer a blood alcohol test (BAT).

The German police took the appellant to a German hospital for the BAT. The military police did not accompany them. At the hospital the German police asked the appellant to read a document which advised him that he had the right to remain silent and request counsel. The form states in part, "If I am subject to the Uniform Code of Military Justice, appointed counsel may be military counsel of my own choice if he is reasonably available." The appellant wrote on the form that he did not consent to be questioned and requested counsel. The German police officer who was with the appellant when the executed this form, Mr. Helmut Seiter, testified that the form addressed only the appellant's options to remain silent

and to counsel with regard to the BAT. The form states, however, that the German police wanted to question the appellant about the kidnapping.

The appellant was taken back to the German police station at Germersheim after completing the BAT. After the German police took some of the appellant's clothes and his shoes, they placed him in a cell furnished with a wooden plank. At approximately 0430 hours, Special Agent (SA) Jeffrey Zwemke, a Criminal Investigation Command (CID) agent, arrived at the police station. Special Agent Zwemke had been called to investigate the kidnapping and rape.

Before talking to the appellant, SA Zwemke was briefed by Specialist Buggy and Mr. Seiter, but SA Zemke was not told by Mr. Seiter that the appellant had told him he wanted to remain silent and be provided with counsel.

Special Agent Zwemke woke the appellant in his cell at approximately 0500 hours. The appellant stated that he initially thought SA Zwemke might be his attorney, but learned that he was a CID agent and had "doubts about talking to him at all." Special Agent Zwemke testified that he informed the appellant that "it would be better for him to make a statement, told him to tell me the truth, and that the Germans didn't know if they were going to prosecute or not. . . ." The appellant waived his rights and gave SA Zwemke an incriminating statement.

At an Article 39(a)[1] session, the appellant moved that the military judge suppress the incriminating statement. The military judge denied the motion and made specific factual findings: (1) the appellant did not assert his right to counsel to Specialist Buggy; (2) the German police advised the appellant he could have counsel only with respect to the BAT; (3) SA Zwemke was not advised that the appellant had requested counsel in response to the German advisement; and (4) the appellant's waiver and statements were voluntary under the totality of the circumstances and were not the result of physical or psychological coercion, threats, or unlawful promises or inducements.

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[1] Article 39(a), Uniform Code of Military Justice, 10 U.S.C. 839(a).

The central issue in this case is whether an accused's assertion of his rights under American law to remain silent and counsel during a police initiated custodial interrogation by law enforcement officials of a foreign country invokes the rule of *Edwards v. Arizona,* 451 U.S. 477 (1981), regarding a subsequent interrogation of that individual by the authorities of a jurisdiction of the United States. We hold that it does not.

In *Edwards v. Arizona, supra,* the United States Supreme Court held that

> [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85. In *Oregon v. Bradshaw,* ___ U.S. ___, 103 S.Ct. 2830 (1983), the Court clarified *Edwards* by confirming that it had announced a "prophylatic rule," i.e., the police are flatly precluded from initiating an interrogation of an accused after he has asserted his right to counsel until after counsel has been provided to him. *Id.* at ___, 103 S.Ct. at 2834. In fact, *Edwards* applies even if the police who conduct the subsequent interrogation of the accused are unaware of his earlier assertion of his rights. *White v. Finkbeiner,* 687 F.2d 885 (7th Cir. 1982). If the police say or do something that renders the conversation initiated by the accused an interrogation, then the question that must be addressed is whether the accused intelligently, knowingly and voluntarily, under the totality of the circumstances, waived his previously invoked rights. *Oregon v. Bradshaw,* ___ U.S. ___, ___, 103 S.Ct. at 2834.

In the case *sub judice,* the appellant contends he initially asserted his rights to remain silent and to counsel to the German authorities, thereby invoking the *Edwards* rule regarding his interrogation by SA Zwemke. We disagree. In our opinion, the appellant could only invoke *Edwards* by asserting his rights in response to a custodial interrogation by agents who are bound by procedures mandated by the United

States Constitution. The actions of officials of the German government are not procedurally controlled by the United States Constitution. The actions or knowledge of the German police are not imputed to United States officials under *Edwards* unless a United States official causes the foreign officials to act in his stead. *See United States v Morrison,* 12 M.J. 272 (CMA 1982). Moreover, ruling that the appellant's statement to SA Zwemke is inadmissible under these circumstances might induce the Germans in the future to retain jurisdiction over cases in which the accused has requested counsel from foreign authorities. Also, application of the *Edwards* rule in this case would place on United States military police an unnecessary burden for operating in a foreign country. United States military police need to perform their vital worldwide police functions without being required to tacitly coordinate with foreign police officials or know of their procedures. Therefore, we hold that since the appellant did not assert his rights under American law to counsel or to remain silent to a person bound by the principles of the United States Constitution, the *Edwards* rule was not invoked.[2] In other words, United States military police do not have to determine whether a suspect in the custody of foreign police has invoked his rights to remain silent or counsel before they initiate custodial interrogation and seek the accused's voluntary, intelligent and knowing waiver of those rights.

Of course, if American authorities attempt to use foreign police officials as a subterfuge to accomplish ends which would be illegal if performed by them, the evidence obtained by this action must be suppressed. *United States v. Morrison, supra.* Viewing the evidence of record as a whole we find some cooperation between the German police and United States military police, but no evidence of any subterfuge, inappropriate conduct or collusion.

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[2] We also note that the right to remain silent under German law apparently operates somewhat differently than under American law: at a trial by the German authorities, adverse comment upon the silence of an accused is permitted. United States v. Jones, 6 M.J. 226, 228 (CMA 1979).

We further find that the appellant's waiver of his rights to SA Zwemke was knowing, voluntary and intelligent under the totality of the circumstances. The issue was fully litigated at trial and the military judge made findings of fact concerning this issue, which were set out earlier in this opinion. We have carefully reviewed these findings and find them to be amply supported by the evidence.

The Court finds that the other issues raised by the appellant are without merit.

The findings of guilty and the sentence are affirmed.

Judge YAWN and Judge WERNER concur.

FOR THE COURT:

/s/ ABRAHAM NEMROW

Abraham Nemrow
Acting Clerk of Court

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